In re: JEANNE AND STEVE CHARTER.
BPRA Docket No. 98-0002.
Ruling Denying Respondents' Petition to Reopen Hearing filed September 22, 2000.

Petition to reopen hearing – First amendment.

Sharlene A. Deskins, for Complainant.
Kelly J. Varnes, Billings, MT, for Respondents.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding by filing a Complaint on August 5, 1998. Complainant instituted this proceeding under the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) [hereinafter the Beef Promotion Act]; the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217) [hereinafter the Beef Promotion Order]; the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) [hereinafter the Beef Promotion Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Complaint alleges that Jeanne Charter and Steve Charter [hereinafter Respondents]: (1) willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997 (Compl. ¶ II); and (2) willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310, .312) by failing to pay assessments for three cattle sold on or about April 4, 1998 (Compl. ¶ III). Complainant requests the issuance of an order requiring Respondents to cease and desist from violating the Beef Promotion Order and the Beef Promotion Regulations and assessing civil penalties against Respondents in accordance with section 9 of the Beef Promotion Act (7 U.S.C. § 2908) (Compl. at 2-3).

On September 29, 1998, Respondents filed an Answer admitting that they did not pay assessments on the sale of cattle as alleged in the Complaint (Answer ¶¶ 3-4) and raising five affirmative defenses (Answer at 2-3).

On August 4, 1999, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] presided over a hearing in Billings, Montana. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Kelly J. Varnes, Hendrickson, Everson, Noennig & Woodward, P.C., Billings, Montana, represented Respondents.

On October 22, 1999, Complainant filed Complainant's Findings of Fact, Conclusions of Law and Brief in Support Thereof. On February 4, 2000,

Respondents filed Respondents' Proposed Findings of Fact and Conclusions of Law and Memorandum in Support of Proposed Findings of Fact, Conclusions of Law and Order. On February 18, 2000, Complainant filed Complainant's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law and Memorandum.

On April 26, 2000, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded Respondents willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to deduct and collect assessments and by failing to remit assessments to a brand inspector or a qualified state beef council for 250 cattle sold on October 9, 1997, and April 4, 1998; (2) concluded Respondents willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay late-payment charges for assessments Respondents failed to remit to a qualified state beef council when due; (3) ordered Respondents to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations; (4) assessed Respondents a $12,000 civil penalty; and (5) ordered Respondents to pay past-due assessments and late-payment charges of $417.79 to the Montana Beef Council (Initial Decision and Order at 3, 10-11).

On June 1, 2000, Respondents filed an Appeal Petition, a Brief in Support of Appeal Petition, and a Petition to Reopen Hearing. On July 7, 2000, Complainant filed Opposition to Defendant's Motion to Reopen Hearing. On September 1, 2000, Complainant filed Opposition to the Appeal Petition of the Respondents.[1] On September 5, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision[2] and a ruling on Respondents' Petition to Reopen Hearing.

Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .

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[1]Complainant filed Opposition to the Appeal Petition of the Respondents 1 day late (See Informal Order dated August 2, 2000). Therefore, I have not considered Complainant's Opposition to the Appeal Petition of the Respondents, and Complainant's Opposition to the Appeal Petition of the Respondents forms no part of the record in this proceeding.

[2]I am filing a Decision and Order simultaneous with the filing of this Ruling Denying Respondents' Petition to Reopen Hearing. *In re Jeanne and Steve Charter*, 59 Agric. Dec. ___ (Sept. 22, 2000).

> (2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

Respondents request reopening of the hearing to adduce evidence "to demonstrate the unregulated nature of the cattle market." (Pet. to Reopen Hearing ¶ 2.) Respondents state that their purpose for adducing this new evidence would be to "provide a basis for the application of . . . *United Foods[, Inc.] v. United States*, 197 F.3d 221 (6th Cir. 1999)" and that "[n]o evidence was offered at the hearing concerning the nature and structure of the cattle market . . . because the *United Foods* decision was not issued until after the hearing on August 4, 1999." (Pet. to Reopen Hearing ¶ 4.)

I deny Respondents' Petition to Reopen Hearing for two reasons. First, *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), is not applicable to this proceeding. *United Foods* addresses the constitutionality of provisions of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) [hereinafter the Mushroom Promotion Act], a statute which is not at issue in this proceeding. In *United Foods*, the Sixth Circuit held that provisions of the Mushroom Promotion Act that compel mushroom producers and mushroom importers to contribute funds used to advertise mushrooms, violate the First Amendment to the United States Constitution.

Relevant to this proceeding are two cases which address the constitutionality of provisions of the Beef Promotion Act which compel cattle producers to contribute funds used to promote beef and beef products. In *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), the United States Court of Appeals for the Third Circuit held the provisions of the Beef Promotion Act that compel cattle producers to contribute funds to promote beef and beef products, do not violate First Amendment rights to freedom of speech and association. Similarly, in *Goetz v. Glickman*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), the United States Court of Appeals for the Tenth Circuit held compelled assessments under the Beef Promotion Act used to fund advertising to promote beef consumption do not violate the First Amendment, as follows:

First Amendment

> Goetz also asserts the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption. Goetz argues the Act singles out and unfairly burdens

producers, importers and persons who must collect the tax (buyers of beef).

The Secretary responds that the Act does not suppress or restrict Goetz' speech, it merely requires he pay an assessment to fund the promotion of a commodity that he markets and is no different than compelled funding of unions or integrated bars. Furthermore, the Secretary and intervenors argue the Act is "government speech" (as opposed to commercial speech) and there are no First Amendment restrictions on "government speech."

This Court agrees with the Secretary and intervenors. *Glickman v. Wileman Bros. & Elliott, Inc.*, ___ U.S. ___, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), involved a First Amendment challenge to a generic advertising program for California peaches, nectarines, and plums which was established pursuant to a marketing order promulgated by the Secretary of Agriculture and supported by mandatory assessments imposed on the handlers of fruit. The Supreme Court granted certiorari to resolve the conflict between the Ninth Circuit in *Wileman Brothers & Elliott, Inc. v. Espy*, 58 F.3d 1367 (1995), which held the peach promotion program violated the First Amendment, and the Third Circuit in *Frame*, which held the Beef Promotion Act did not violate the First Amendment.

In *Wileman Bros.* the Supreme Court held that the generic marketing program did not raise a First Amendment issue for the Court because the marketing order did not impose restraint on the freedom of any producer to communicate any message to any audience, did not compel any person to engage in any actual or symbolic speech, and did not compel the producers to endorse or to finance any political or ideological views. *See id.* at 2138. The Supreme Court found its compelled speech cases inapplicable because there is no "compelled speech." The Court held the assessments for ads did not require the fruit producers to repeat objectionable messages, use their property to convey antagonistic ideological messages, force them to respond to a hostile message when they prefer to remain silent or require them to be publicly identified or associated with another's message. *See id.* at 2139. Furthermore, the Court said, the assessments are financial contributions for generic advertising that program participants do not disagree with, and the advertising is not attributed to individual handlers. *See id.* In addition, none of the generic ads promote any particular message other than encouraging consumers to buy California tree fruit. *See id.*

The Court concluded that the generic ads for California fruit are germane to the purposes of the marketing orders and the assessment is not used for ideological activities. *See id.* at 2140. The Court further concluded that

> generic advertising is a species of economic regulation that should enjoy the same strong presumption of validity that the Court accords other policy judgments made by Congress. *See id.* at 2141. Finding the generic advertisements do not warrant special First Amendment scrutiny under the *Central Hudson* standard, the Supreme Court reversed the Ninth Circuit decision. *See id.* at 2142.
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> In the case at bar, the district court incorrectly concluded that the Act was commercial speech and applied *Central Hudson*. The district court found the Act passed the *Central Hudson* test and did not violate Goetz' freedom of speech and association. *Goetz v. Glickman*, 920 F. Supp. at 1182-83. We find the district court erred in applying the *Central Hudson* test to Goetz' First Amendment claim. However, we can affirm the district court on a basis not relied on by the court if supported by record and law. *United States v. Corral*, 970 F.2d 719, 726 n.5 (10th Cir. 1992). Therefore, we affirm the district court and find under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless.

Goetz v. Glickman, 149 F.3d at 1138-39 (footnote omitted).

In light of *Goetz* and *Frame*, which address the constitutionality of the statute under which this proceeding was instituted, I find *United Foods*, which addresses the constitutionality of the Mushroom Promotion Act, inapplicable to this proceeding. Therefore, Respondents' Petition to Reopen Hearing to adduce evidence to provide a basis for the application of *United Foods* is denied.

Second, even if I found *United Foods* applicable to this proceeding, I would deny Respondents' Petition to Reopen Hearing because Respondents have not provided a good reason for their failure to adduce evidence to demonstrate the unregulated nature of the cattle market during the August 4, 1999, hearing.

Respondents contend that they did not adduce evidence of the unregulated nature of the cattle market at the August 4, 1999, hearing because *United Foods* was not decided until after the August 4, 1999, hearing. I agree with Respondents that *United Foods* was not decided until after August 4, 1999. However, the decision in *United Foods* was not a necessary prerequisite to Respondents' adducing evidence to demonstrate that the cattle market is unregulated. Respondents appear to take the position that evidence of the unregulated nature of the cattle market became relevant to this proceeding only after the United States Court of Appeals for the Sixth Circuit, in *United Foods,* interpreted *Glickman v. Wileman Bros. & Elliott Inc.*, 521 U.S. 457 (1997), as only applying to extensively regulated industries.

The Supreme Court of the United States held in *Glickman v. Wileman Bros. & Elliott Inc.*, 521 U.S. 457 (1997), that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are

issued under the Agricultural Marketing Agreement Act of 1937, as amended, neither abridge First Amendment rights nor implicate the First Amendment. The Sixth Circuit distinguished *Wileman* from *United Foods* on the ground that the California tree fruit business at issue in *Wileman* is extensively regulated, but that the mushroom business at issue in *United Foods* is unregulated, except for the enforcement of a regional mushroom advertising program. In *United Foods*, the Sixth Circuit interprets *Wileman* as holding that compelled commercial speech is permitted under the First Amendment to the United States Constitution if (1) the compelled commercial speech is germane to a valid, comprehensive, regulatory scheme, and (2) the compelled commercial speech is nonideological, nonsymbolic, and nonpolitical in nature, as follows:

> We do not read the majority opinion in *Wileman* as saying that any compelled commercial speech that is nonpolitical or nonsymbolic or nonideological does not warrant First Amendment protection. We conclude that the explanation for the *Wileman* decision is found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of the free market, as well as in the nonpolitical nature of the compelled speech. The majority uses this concept of collectivization and the nonideological nature of the advertising together. The conjunction "and" germaneness "and" nonpolitical–is used in the Court's holding. Our interpretation of *Wileman* is that if either of the two elements is missing–either the collectivization of the industry or the purely commercial nature of the advertising–the First Amendment invalidates the compelled commercial speech, absent some other compelling justification not present in the case before us. The Court's holding in *Wileman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise.

United Foods, Inc. v. United States, 197 F.3d at 224.

However, litigants raised the issue of the scope of *Wileman* long before the decision in *United Foods*. For instance, the United States District Court for the Eastern District of California rejected contentions that *Wileman* does not apply to the California table grape industry and the California cut flower industry because those industries are not extensively regulated. In *Delano Farms Co. v. California Table Grape Comm'n*, the district court held:

> [*Wileman's*] holding is summarized in the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech . . . ." That principle controls. Plaintiff's argument [that] a different result obtains when a program does not regulate fruit size, color, etc. is unconvincing. Were that the case, the state

> could validate a program merely by adding additional regulatory burdens. Nothing in [*Wileman*] indicates results should differ in "stand alone" advertising programs.

Delano Farms Co. v. California Table Grape Comm'n, CV-F-96-6053 OWW DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997) (App. A).

In *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, the district court, as stated during the hearing, held:

> Plaintiff is mistaken in arguing that the California Cut Flower industry is to be distinguished from the more heavily regulated peach and nectarine production industry which the *Wileman* case considered. The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court under its free speech jurisdiction.

Matsui Nursery, Inc. v. California Cut Flower Comm'n, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997) (Reporter's Transcript) (App. B).

Respondents could have adduced evidence at the August 4, 1999, hearing to support their position that, based upon the nature of the cattle market, the provisions of the Beef Promotion Act, which compel cattle producers to contribute funds used to promote beef and beef products, are unconstitutional. The issuance of *United Foods* was not essential to Respondents' adducing evidence to support their position. Therefore, the issuance of *United Foods* after the August 4, 1999, hearing is not a good reason for Respondents' failure to adduce evidence regarding the nature of the cattle market during the August 4, 1999, hearing.

Respondents' Petition to Reopen Hearing to adduce evidence regarding the "unregulated nature of the cattle market" is denied.

APPENDIX A

Delano Farms Co. v. The California Table Grape Comm'n, CV-F-96-6053 OWW DLB (E.D. Cal. Sept. 11, 1997).

APPENDIX B

Matsui Nursery, Inc. v. The California Cut Flower Comm'n, Civ. No. S-96-102 EJG/GGH (E.D. Cal. Aug. 4, 1997).